

I.R. NO. 2023-3

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY
OF NEW JERSEY,

Respondent,

-and-

Docket No. CO-2023-053

AAUP-AFT, AAUP-BHSNJ,
PART-TIME LECTURERS AAUP-AFT,

Charging Parties.

SYNOPSIS

A Commission Designee grants in part an application for interim relief filed by the AAUP against Rutgers alleging that Rutgers violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(1) and (5), by unilaterally revising its existing COVID-19 policy and eliminating the requirement for face coverings in indoor teaching spaces and libraries. The Designee finds that a determination regarding whether the AAUP has a substantial likelihood of prevailing in a final Commission decision is unclear. The Designee also finds that the AAUP has demonstrated that increased exposure to COVID-19 for unit members who are immunocompromised or live with someone who is immunocompromised (or for other good cause) creates a greater risk of death or life-threatening illness for those individuals and therefore constitutes irreparable harm and a relative hardship for AAUP members; and that the public interest will not be injured by an interim relief order. The Designee denies AAUP's proposed relief and dissolves the temporary restraints; however, the Designee directs Rutgers to process applications filed by immunocompromised unit members and unit members who live with someone that is immunocompromised (and/or for other good cause shown) who are at greater health risk due to increased exposure to COVID-19 on an expedited/emergent basis, and to meet/confer with AAUP to promptly develop and implement reasonable accommodations for applicants while their applications are being processed/pending. The unfair practice charge was transferred to the Director of Unfair Practices for further processing.

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Appearances:

For the Respondent,
McElroy, Deutsch, Mulvaney & Carpenter, LLP, attorneys
(John J. Peirano, of counsel; David M. Alberts, of
counsel)

For Charging Parties,
Weissman & Mintz, LLC, attorneys
(Ira W. Mintz, of counsel; Brett M. Pugach, of counsel)

INTERLOCUTORY DECISION

On September 30, 2022, AAUP-AFT, AAUP-BHSNJ, and Part-time Lecturers (PTL) AAUP-AFT (collectively, Charging Parties or AAUP) filed an unfair practice charge, together with an application for interim relief, against Rutgers, The State University of New Jersey (Respondent or Rutgers). The charge alleges that on or about September 26, 2022, Rutgers violated the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq.,

specifically subsections 5.4a(1) and (5),^{1/} by unilaterally revising its existing COVID-19 policy and eliminating the requirement for face coverings in indoor teaching spaces and libraries.

AAUP's application for interim relief requests the following relief pending disposition of the underlying unfair practice charge, including temporary restraints:

-Rutgers shall allow faculty teaching in-person classes to have discretion to require that face coverings be worn in all indoor teaching spaces;

-Rutgers shall not implement and enforce its revised COVID-19 policy, issued on September 26, 2022, insofar as it eliminates the requirement that face coverings be worn in all library facilities;

-Rutgers shall negotiate over the implications of the revised COVID-19 policy on employee health and safety; and

-Respondent shall notify employees and students by email and on their University website that faculty have the discretion to require face coverings in their in-person teaching spaces and that face coverings must be worn in library facilities.

^{1/} These provisions prohibit public employers, their representatives or agents from "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act"; and "(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

PROCEDURAL HISTORY

On October 3, 2022, I signed an Order to Show Cause temporarily restraining Rutgers from unilaterally implementing and enforcing its revised COVID-19 policy, issued on September 26, 2022, insofar as it (1) eliminates the requirement that face coverings be worn in all library facilities and (2) restricts the discretion of unit members who are teaching in-person classes (i.e., unit members who are immunocompromised, live with someone who is immunocompromised, or for other good cause) to require that face coverings be worn in all indoor teaching spaces. Therein, I also specified that Rutgers could move for dissolution or modification of the temporary restraints on two days' notice or on such other notice as may be ordered; directed Rutgers to file any opposition by October 10; directed AAUP to file any reply by October 14; and set October 19 as the return date for oral argument.

On October 4, 2022, Rutgers filed a motion to dissolve the temporary restraints set forth above. On October 5, 2022, Rutgers agreed that its motion to dissolve the temporary restraints could be considered its opposition to the application for interim relief if I agreed to expeditiously issue a decision resolving this matter. Accordingly, I directed AAUP to file any reply by October 9; and rescheduled October 10 as the return date for oral argument. On October 10, 2022, counsel engaged in oral

argument during a telephone conference call.

In support of its application for interim relief, AAUP filed a brief, exhibits, the certification of AAUP-AFT President Rebecca Givan (Givan); and the certification of AAUP-AFT Senior Staff Representative BJ Walker (Walker).^{2/} In opposition, Rutgers filed a brief, exhibits, the certification of its Executive Vice Chancellor and Associate Professor of Sociology Sherri-Ann Butterfield (Butterfield); the certification of its Executive Vice President and Chief Operating Officer Antonio Calcado (Calcado); the certification of its Vice President of University Libraries and University Librarian Consuella Askew (Askew); the certification of Assistant Vice Chancellor for Technology and Instruction Paul Hammond (Hammond); and the certification of its Assistant Vice President for Academic Labor Relations Paula Mercado-Hak (Mercado-Hak).^{3/} AAUP also filed a reply brief and the certification of Librarian of Practice/AAUP-AFT member Angela Lawrence (Lawrence); the certification of Professor/AAUP-AFT member Ariane Chebel (Chebel); the certification of Associate Professor/AAUP-AFT member Robert Scott (Scott); the certification of Professor/AAUP-AFT member Troy

^{2/} Upon request, AAUP also circulated the parties' current collective agreements.

^{3/} Upon request, Rutgers also circulated University Policy Section # 60.1.34 entitled, "Disability and Reasonable Accommodation Policy."

Shinbrot (Shinbrot); the certification of Associate Professor/AAUP-AFT member Regina Marchi (Marchi); the certification of Professor/AAUP-AFT member Ira Roseman (Roseman); the certification of Professor/AAUP-BHSNJ President Catherine Monteleone, M.D. (Monteleone); and the certification of Part-time Lecturer/PTL AAUP-AFT member Dan Sidorick (Sidorick).

FINDINGS OF FACT

AAUP-AFT represents faculty members, teaching assistants, and graduate assistants employed by Rutgers. See 2018-2022 AAUP-AFT CNA, Art. 3. Rutgers and AAUP-AFT are parties to an expired collective negotiations agreement (CNA) in effect from July 1, 2018 through June 30, 2022. The grievance procedure ends in binding arbitration for Category One grievances^{4/} and advisory arbitration for Category Two grievances.^{5/} See 2018-2022 AAUP-

4/ "A Category One grievance is a grievance alleging a breach, misinterpretation or improper application of the terms of this Agreement involving a mandatory subject of negotiations, including an allegation of unjust discipline." See 2018-2022 AAUP-AFT CNA, Art. 9.

5/ "A Category Two grievance is a grievance alleging: a.) a violation, misinterpretation or improper application of the terms of this Agreement involving a non-mandatory subject of negotiations; or b.) there has been a misrepresentation, misapplication or violation of University policies, agreements, or administrative decisions, which intimately and directly affect the work and welfare of members of the unit. Also included in Category Two are allegations concerning any matter which is mandated by law to be a subject of a grievance procedure of the Agreement, and which has not been provided for under Category One" See 2018-2022 AAUP-AFT CNA, Art. 9.

AFT CNA, Art. 9.

AAUP-BHSNJ represents all teaching and/or research faculty and staff librarians [employed] by Rutgers in legacy UMDNJ positions, but specifically excluding certain employees as set forth in the parties' recognition provision (e.g., faculty members and staff librarians who, in addition to their professorial or librarian titles, hold any title which carries managerial, administrative, or supervisory responsibility; all faculty members or staff librarians who work on average of fewer than four hours per week over a period of 90 days; and persons otherwise employed by the University who are presently represented for purposes of collective negotiations by another employee organization). See 2018-2022 AAUP-BHSNJ CNA, Art. II. Rutgers and AAUP-BHSNJ are parties to an expired CNA in effect from July 1, 2018 through July 31, 2022. The grievance procedure ends in binding arbitration for Category One grievances and advisory arbitration for Category Two grievances (i.e., as defined above). See 2018-2022 AAUP-BHSNJ CNA, Art. V.

Part-time Lecturers (PTL) AAUP-AFT represents part-time lecturers employed by Rutgers. See 2018-2022 PTL AAUP-AFT CNA, Art. 1. Rutgers and PTL AAUP-AFT are parties to an expired CNA in effect from July 1, 2018 through June 30, 2022. The grievance procedure ends in advisory arbitration for most grievances (i.e., binding arbitration only for grievances alleging a violation of

Article 2 Nondiscrimination or Article 4 Salary Provisions). See 2018-2022 PTL AAUP-AFT CNA, Art. 5.

Article 20 of the AAUP-AFT CNA and Article XXIV of the AAUP-BHSNJ CNA, both entitled "Health and Safety," provide in pertinent part:

A. The University and the [AAUP-AFT/AAUP-BHSNJ] agree to establish a Joint Health and Safety Committee to be co-chaired by a designee of the Rutgers Environmental Health and Safety Department and by a negotiations unit member appointed by the [AAUP-AFT/AAUP-BHSNJ]. The Joint Health and Safety Committee shall be a standing committee, and once constituted, shall meet a minimum of two times per academic year to discuss employment-related health and safety concerns of negotiations unit members. The [AAUP-AFT/AAUP-BHSNJ] may appoint up to four (4) negotiations unit members to serve on this committee. The [AAUP-AFT/AAUP-BHSNJ] may request the attendance of any administrative officer whom it believes can provide detailed information on a subject related to the health and safety of negotiations unit members to attend meetings of the Joint Health and Safety Committee. Such request shall not be unreasonably denied.

B. Negotiations unit members are responsible for reporting health and safety problems to their dean or director and to the Rutgers Environmental Health & Safety Department.

C. No negotiations unit member shall be required to work under conditions where there has been a determination, on a reasonable basis in fact, that those conditions pose an imminent danger to health and safety. It shall be the responsibility of the University to make such determinations as rapidly as possible.

Article 10 of the PTL AAUP-AFT CNA, entitled "Health and Safety," provides:

If a PTL believes that a safety problem exists, the PTL should report that concern in the first instance to the department chair or his/her designee or if that is not possible, to the Rutgers Environmental Health and Safety Department. If the University determines that a work site is unsafe, the PTL will not be required to teach at that site until the University declares the site to be safe. The University will discharge its responsibility for the development and enforcement of occupational safety and health standards to provide a safe and healthful environment in accordance with PEOSHA and any other applicable statutes, regulations or guidelines published in the New Jersey Register which pertain to health and safety matters. This paragraph is not subject to the grievance procedure.

Rutgers' Executive Vice President (EVP) and Chief Operating Officer (COO) Antonio Calcado (Calcado) certifies that "[d]ue to [his] position, since late 2019, [he] [has] been intimately involved with and primarily responsible for [Rutgers'] decision-making concerning COVID-19 safety protocols and policies." See Calcado Certification, ¶3. Calcado certifies that "[d]uring the course of the COVID-19 pandemic, [Rutgers] has implemented numerous written health and safety rules, protocols, and policies in conformance with and at times exceeding guidelines published by public health officials" as follows:

-for a period of time beginning in March 2020 and continuing through the Summer of 2021, Rutgers limited the number of people who were on campus, and many educational activities were conducted via remote

learning platforms;

-when Rutgers began the process of repopulating its campuses with the intent of returning to in-person learning for Fall 2021, Rutgers imposed various protective measures, including, but not limited to, COVID-19 vaccination requirements for students and employees, social distancing rules, masking and/or face covering requirements, and other health and safety protocols; and

-as the pandemic evolved and as public health officials modified guidelines relating to COVID-19, Rutgers likewise adjusted its health and safety rules.

[Calcado Certification, ¶¶4-7.]

On August 16, 2022, Rutgers' EVP/COO Calcado sent an email to Rutgers Community Members (INFO_ALLCAMPUSES@RAMS.RUTGERS.EDU) regarding "Fall Semester 2022 Health & Well-Being Protocols" that provides in pertinent part (emphasis supplied):

As we return for the fall semester and a full repopulation of our campuses, we continue to monitor the effects of the COVID-19 and the monkeypox viruses. Each is different and unique, but both have tremendous potential to affect the health and well-being of our community.

With respect to COVID-19, the BA.5 subvariant of Omicron continues to spread throughout our population in New Jersey and across the country. The good news is that the spread does not correlate to hospitalizations, intensive care unit beds, or deaths. In fact, the increased hospitalizations being reported are primarily hospitalizations with COVID-19, rather than hospitalizations for COVID-19. At Rutgers, we attribute that to the community wide mitigation efforts we put in place over the last two years, including, but not limited to, mandatory vaccination, testing, quarantine, and contact tracing.

Please review the following information about COVID-19 and monkeypox as you prepare for the new semester.

COVID-19 Protocols

It is clear that the COVID-19 virus, in some form, is now a permanent part of our daily lives. As the virus moves from pandemic to endemic, Rutgers continues to maintain its COVID-19 safety protocols on face coverings, vaccines and boosters, testing, and quarantining and isolation. As a reminder, I would direct you to the following protocols in particular:

Face coverings: Face coverings are required in all indoor teaching spaces, libraries, and clinical settings. Compliance is mandatory.

Vaccines and boosters: All students and employees are required to be fully vaccinated, obtain a booster when eligible, and upload records to the university vaccine portal.

Events: All indoor events require attendees to show proof of full vaccination or a COVID-19 negative PCR test taken within 72 hours prior to the event. Face coverings are no longer required at events. There are no restrictions imposed on outdoor events.

Vaccine requirements for contractors, volunteers, and others: Please review the current university policy that addresses vaccination requirements for volunteers, contractors, guest lecturers, and others. The FAQ about the policy is also helpful.

* * *

The university will continue to monitor both viruses and will update these important protocols throughout the fall semester.

[Butterfield Certification, Ex. A; accord
Givan Certification, ¶2.]

However, Calcado also certifies that "[Rutgers] [subsequently]

decided . . . [that requiring face coverings] was no longer consistent with public health or educational policy.” See Calcado Certification, ¶¶8-9.

On September 26, 2022, Rutgers’ EVP/COO Calcado sent another email to Rutgers Community Members (INFO_ALLCAMPUSES@RAMS.RUTGERS.EDU) regarding “Important Updates and Changes to Rutgers’ COVID-19 Protocols” that provides in pertinent part (emphasis supplied):

As the COVID-19 virus continues to move from pandemic toward endemic, we are eager to return the university to normal operations as much as responsibly possible. In doing so, we continue to take prudent steps to mitigate the effects of this virus so our students can enjoy a vibrant, in-person college experience.

I am writing to announce that we are making several significant updates to our COVID-19 protocols, effective October 1, 2022. We are making these changes after careful consultation with our own medical experts and in recognition of a stable public health situation on our campuses and across the state.

Face coverings: Although they will continue to be required in all clinical settings, face coverings will no longer be required in indoor teaching spaces and libraries. Where masks are optional, we encourage all individuals who prefer to wear them to do so, and we fully respect that personal decision. Further, as the pandemic remains fluid, the university is prepared to revisit this change in protocol should future public health conditions warrant.

Vaccines and boosters: All students and employees are required to be fully

vaccinated, obtain a booster when eligible, and upload records to the university vaccine portal. There is no change in this requirement. The university urges all members of its community to obtain vaccination boosters as soon as eligibility permits. See CDC guidance for information.

Testing for Covered Individuals with waivers: Covered Individuals with medical or religious waivers must continue to test; however, once-weekly testing with self-administered rapid (antigen) tests is now required instead of twice-weekly PCR testing. Test results must be uploaded here.

Testing for individuals with waivers: Students and employees with medical or religious waivers who are not Covered Individuals must continue to test once per week, but now through self-administered rapid (antigen) tests instead of PCR testing, and must upload their results here.

Test Kits: Rutgers will transition to self-administered rapid (antigen) tests, which will be available through the established test kit vending machines. Individuals with waivers must upload test results by way of an attestation; results must be uploaded here.

All students, irrespective of waiver status, may avail themselves of up to two tests per week and upload their results.

Events: Both indoor and outdoor events, will no longer require attendees to show proof of full vaccination or a negative COVID-19 test.

Vaccine requirements for contractors, volunteers, and others: Existing protocols remain in place. Please review the current university policy that addresses vaccination requirements for volunteers, contractors, guest lecturers, camp participants, and others. The FAQs about the policy are also helpful.

COVID-19 Vaccinations: Although our vaccination requirements remain in place, the university will no longer offer COVID-19 vaccinations or boosters on campus, as these are readily available at pharmacies, clinics, and physician offices. Rutgers' COVID-19 vaccination locations will be closed by September 30.

* * *

As we make these changes, please be assured that the university will continue to monitor the data associated with COVID-19 and the guidance of state and federal health agencies. I salute and thank all those at Rutgers who have played a role in keeping our community healthy and safe throughout the past two and a half years.

[Calcado Certification, ¶¶8-9, Ex. A; accord Givan Certification, ¶5.]

Later on September 26, 2022, AAUP-AFT President Rebecca Givan (Givan) sent an email to Rutgers' Vice President for University Labor Relations and Special Counsel for Labor Affairs David Cohen (Cohen) that provides:

The University has announced that it will be ending the in-classroom and library mask mandate effective October 1, 2022. This constitutes a change in a term and condition of employment as the classroom mask mandate has been in effect since students returned to campus when in-person instruction resumed for many courses in fall 2021. The mandate was designed to protect the health of faculty and students. Removing the mandate has a direct impact on the health of our members at a time when COVID transmission rates are again on the rise. Accordingly, the AAUP-AFT, AAUP-BHSNJ and PTLFC request that the University bargain over this change in terms and conditions of employment prior to implementation. The Unions are prepared to meet this week to negotiate over the lifting of the mask mandate in classrooms and the

libraries. Please provide us with your available dates. In addition, please provide us with the information and documents upon which the University relied to lift the classroom mask mandate, including COVID transmission rates on each of the University's campuses, and any guidance from the CDC and/or the NJ Department of Health.

[Mercado-Hak Certification, Ex. A.]

Rutgers' Assistant Vice President for Academic Labor Relations Paula Mercado-Hak (Mercado-Hak) certifies that "[f]ollowing [Rutgers'] September 26, 2022 announcement regarding the revisions to its COVID-19 policies, AAUP-AFT, BHSNJ, and AAUP-PTL demanded to negotiate regarding the changes." See Mercado-Hak Certification, ¶4. Mercado-Hak certifies that "[o]n September 29 and 30, 2022, [Rutgers] officials met with the [AAUP] to explain (but not negotiate) the changes to [Rutgers'] COVID-19 policies" and "[d]uring the meeting, [AAUP] expressed its disagreement with [Rutgers'] decision to relax the masking rules for indoor teaching spaces and libraries" and "indicated that some of its members are immunocompromised and would be negatively affected by the change"; and "[Rutgers'] officials expressed their understanding ut noted the written procedure through which these individuals could request an accommodation if they believe they had a disability for which they wanted an accommodation." See Mercado-Hak Certification, ¶¶5-8. Mercado-Hak certifies that "[AAUP] demanded [that] the policy be withdrawn to allow time for unit members to decide whether to

submit an accommodation request and for [Rutgers] to process those requests"; "[AAUP] further demanded that all faculty members (regardless of whether they were immunocompromised, seeking an accommodation, etc.) be permitted to decide, on a case-by-case basis, whether masks would be required in classrooms." See Mercado-Hak Certification, ¶9. Mercado-Hak certifies that "[Rutgers] declined to withdraw its policy or empower faculty members to make decision regarding student masking"; and as of October 4, 2022, "[Rutgers] has received a total of two accommodation requests from [AAUP] unit members . . . since the September 26, 2022 announcement of the lifting of the mask mandate." See Mercado-Hak Certification, ¶¶10-11.

On September 30, 2022, AAUP filed the underlying unfair practice charge and the instant application for interim relief.

AAUP-AFT President Givan certifies that "[b]y continuing to require face coverings in teaching spaces and libraries [until October 1, 2022], faculty were provided with a certain level of protection with respect to exposure to COVID-19 . . . [and] reasonably relied on this protocol in making decisions as to which classes they would teach [during the Fall 2022], particularly with respect to online versus in-person classes." See Givan Certification, ¶¶2-4. Givan certifies that "[Rutgers] refused to negotiate over its decision to eliminate the requirement to wear face coverings in teaching spaces and

libraries, including over the ability for employees - many of whom are health-compromised, live with a family member who is health-compromised, or are otherwise susceptible to greater health risks from exposure to COVID-19 - to (1) have the discretion to require face coverings in their specific teaching spaces; and (2) to keep the face covering requirement in place in library facilities where faculty could be exposed to non-vaccinated individuals." See Givan Certification, ¶¶5-6. Givan certifies that "[a]s a result, faculty who are teaching in-person classes or who work in library facilities will be required to teach or work in confined indoor teaching spaces or work areas alongside students and others who choose not to wear face coverings"; and "faculty who relied on the safety features of requiring face coverings in the prior policy to guide their decision to teach in-person classes [for the Fall 2022] semester . . . will nevertheless be forced to teach in-person to students who are no longer required to wear face coverings, at potential grave risk to themselves and others." See Givan Certification, ¶7.

AAUP-AFT Senior Staff Representative BJ Walker (Walker) certifies that he "spoke with"^{6/} the following unit members

^{6/} As part of its reply papers, AAUP filed certifications from each of the individuals that Walker "spoke with"; and those individuals certified that Walker's recitation of information about him/her was "true and accurate."

regarding the impact of Rutgers' "mid-semester policy change"

(Walker Certification, ¶¶2-3):

-Angela Lawrence, who is a Librarian of Practice in the Dana Library on the Newark Campus, who provided the following information. She has been employed by Rutgers since September 1, 2012. Her responsibilities include arranging and describing archival collections and making collections discoverable and accessible for researchers. She also performs reference services for the Rutgers community. Ms. Lawrence has a primary immunodeficiency and has been advised by her physician to avoid large crowds. The University's lifting of the mask mandate puts her at considerable risk and forces her to decide between protecting her health and her job. Her position requires that she interact with students and staff and to occupy public spaces in the library with crowds of people. Since the pandemic, she has been permitted to work from home two days per week and to limit interactions in a way that was protective of her health, with a mandate from the University that everyone be masked. During that time, the library was only open to vaccinated and masked Rutgers students and staff. She has been diligent in her personal life in avoiding crowded public spaces and avoiding many social activities, so that she can be present for work. Now with the new mask policy, her most consistently risky behavior will be going to work.

-Ariane Chebel, who is a Professor in the School of Public Affairs, Faculty of Arts and Sciences, at the Newark Campus, who provided the following information. She has been employed by the University since September 1, 2009. Her duties include teaching, scholarship, and service. Ms. Chebel is a cancer survivor, and she remains medically compromised. This semester, she is teaching a course for SPAA (Administrative Ethics, 20:834:515:01) in CPS 309. In this course, she teaches eleven students in a closed room, with no windows. She agreed to teach most sessions in person based on the University's mandate that all faculty, staff, and students would be required to be masked while on University property. The lifting of that mandate puts her health at grave risk. As the science has shown that masking helps prevent the spread of the COVID virus, she relied on students being required to be masked in the classroom when she agreed to return to

in-person teaching. She finds it unconscionable that the University would so cavalierly take this action, without thought or plan as to how it will impact her and others who are medically compromised.

-Robert Scott, who is an Associate Professor in the Department of Anthropology, School of Arts and Sciences, who provided the following information. He has been employed by the University since September 1, 2007. His duties include teaching, research, and service. Mr. Scott has multiple medical conditions including psoriatic arthritis, hypertension, and diabetes and long-term treatment with steroids that place him in an immunocompromised state and at great risk should he be exposed to COVID. He is assigned to teach a larger lecture course which, if taught in person, requires him to be in a closed room with 125 students, as well as his co-instructor and three teaching assistants. He also teaches an Honors course which, if taught in person, requires him to be in close proximity to seventeen students. Mr. Scott has to remain vigilant, and he has, in his personal and professional life, been extremely careful and has not exposed himself to risky situations where his chance of contracting the virus is elevated. The University's decision to lift the mask mandate puts him at great risk. He made a decision about returning to in-person teaching based on a policy requiring all staff, students, and employees to remain masked on University property and in particular in teaching spaces. If he had known the policy would not be in place during the entirety of the semester, he would have sought accommodations that would permit remote teaching and would have prepared his pedagogy appropriately. The decision by the University affords him no time to do this before the mask mandate is lifted and leaves him insufficient time to adapt his syllabus to remote teaching.

-Troy Shinbrot, who is a Professor of Biomedical Engineering in the School of Engineering at Rutgers University, who provided the following information. He has been employed by the University since January 1, 1998. He is the primary caregiver for his 93 year-old mother, who is in home hospice. Although Mr. Shinbrot is not personally medically compromised, if he were to transmit COVID to her from an unmasked student, she is certain to die in misery and isolation, rather than in

the planned and compassionate way that she planned. He teaches two courses, Biomedical Ethics (enrollment 83, in-class attendance 36), and Mathematical Modeling (in class attendance 34). Mr. Shinbrot agreed to teach in-person based on the assurance and expectation that all attendees in classes would wear masks. He has been extremely careful so as to protect his elderly mother, but is very worried that this mid-semester change in policy will put her at significant risk.

-Regina Marchi, who is an Associate Professor of Journalism and Media Studies at Rutgers University, who provided the following information. She has been employed by the University since September 1, 2006. Her duties as a faculty member include teaching, research, and service. As a teacher, she is assigned to teach two courses this semester. One course is taught remotely and the other is a class with 19 students in a small room with a window that does not open. When her in-person course was assigned, the University had in place a mandate requiring all employees and students to wear masks while on campus - a policy that was reaffirmed (regarding classrooms) by the University administration just before the semester began. This is critically important to Ms. Marchi as she lives with an immunocompromised partner and also spends time caring for her elderly father, who has severe COPD. While some people may feel comfortable unmasked in indoor spaces, Ms. Marchi has been and continues to be extremely careful. She has not had COVID, and she and her partner avoid socializing, indoor dining at restaurants, and indoor entertainment activities such as theater productions, concerts, and movies. She absolutely made her decision to teach on campus this semester based on the masking policy in place at that time. If that had not been in place, Ms. Marchi would have requested to teach remotely. She is shocked that this decision was made with no warning and that she is now faced with putting her loved ones' health at risk if she teaches in person, given that the University has not provided sufficient time to apply for an accommodation.

-Ira Roseman, who is a Professor of Psychology in the Faculty of Arts and Sciences in Camden, who provided the following information. He has been teaching at Rutgers since September 1, 1992. In addition to teaching his duties include scholarship and service.

According to the CDC, based on his age of 69, he is at five times greater risk for hospitalization and 60 times greater risk of death because he has coronary artery disease. This semester he is teaching Social Psychology to a class of 38 undergraduates in 123 Armitage Hall. This is a fairly crowded classroom with one window that is bolted shut. Mr. Roseman requested a larger room at the outset of the semester in order to allow for social distancing, but none is available at the time that the course is taught. When this in-person course was scheduled, the University had in place a requirement that all employees and students wear masks in all indoor teaching spaces. This mandate provided some assurance to Mr. Roseman that the risk of transmission was reduced to a tolerable level. The University's unilateral decision to lift the mandate puts him and his family at a level of risk that is unacceptable.

[Walker Certification, ¶¶4-9; see also Lawrence Certification, ¶2; Chebel Certification, ¶2; Scott Certification, ¶2; Shinbrot Certification, ¶2; Marchi Certification, ¶2; Roseman Certification, ¶2.]

Professor/AAUP-BHSNJ President Catherine Monteleone, M.D.

(Monteleone) certifies the following:

-Dr. Monteleone is a Professor in the Allergy, Immunology and Infectious Disease division of the Department of Medicine in the Robert Wood Johnson School of Medicine. Both in her capacity as a medical doctor and as union president, she believes masks are still a valuable tool in preventing the spread of COVID-19 on Rutgers' campuses and are even more effective when both persons whom encounter one another are wearing them. AAUP-BHSNJ has unit members who are at high-risk for COVID-19 mortality either due to age, immunosuppression, or other factors and who work in classrooms and other locations that are not clinical settings. As such, Rutgers' change to the mask mandate in non-clinical settings would pose a serious health risk to those unit members. AAUP-BHSNJ has often assisted unit members who have been denied reasonable accommodations since Rutgers routinely claims that granting reasonable accommodations is an 'undue burden.' As such, Dr. Monteleone has grave concerns that relying solely on a reasonable accommodation

process to enable continued mask wearing would result in many of our members being put at further risk COVID-19 exposure. Allowing unit members the discretion to require masks in classrooms and similar settings would be easier, less bureaucratic, and empower those with a high-risk for COVID-19 mortality but who may not necessarily have a recognized ADA disability to protect themselves.

[Monteleone Certification, ¶¶1-4.]

Part-time Lecturer/PTL AAUP-AFT member Dan Sidorick

(Sidorick) certifies the following:

-Sidorick, who is a Part-time Lecturer in the Labor Studies Department, teaches a course (Labor Studies 202) in Murray Hall 114 for three hours every Monday evening. There are 40 students in the class and the small classroom nominally seats 45. Students are crammed into the room with desks touching each other and very little room between students. There are two windows, but neither can be opened. He has not been able to find any information about the adequacy of ventilation in this space. Sidorick is at heightened risk for COVID because some of his students may have chronic diseases or are immunocompromised and occupying the same small space for three hours increases the probability of COVID transmission. Nominally all students are vaccinated but religious and medical exemptions are allowed and he is not notified if any exempt students are in his classroom. Sidorick agreed to teach in-person this fall at Rutgers in part because of Rutgers' continuing mask mandate. He turned down an opportunity at another university (University of Pennsylvania) because they had transitioned to a non-universal mask policy. Some of his students may have decided to attend Rutgers in person because of the mask mandate. With the recent reversal in policy, Sidorick and his students are now exposed to higher risk of contracting COVID and he is extremely concerned because the pandemic is still causing immense suffering and death in the U.S. Last week, 2,926 people died of COVID in the U.S. (About the same as died in the 9/11 attacks), and we may be in the beginning of a new surge. While there is no sure way of avoiding the risk, masking significantly lowers the risk. Improving and monitoring ventilation and relocating to a larger

space where students could maintain adequate distance from each other would also help, but these options are not available. The decision to abandon the mask mandate was dictated unilaterally by Rutgers' administration without any consultation with the faculty, many of whom have expertise in biology, public health, and other related fields or with our union or students. If such consultation had occurred, a mutually agreed solution that continued to protect all parties would likely have been possible.

[Sidorick Certification, ¶¶1-6.]

Rutgers' EVP/COO Calcado certifies that he "was involved in the decision to relax the mask mandate" and that "[t]he basis for [Rutgers'] decision" was based upon the following reasons:

- Medical experts, including the University's epidemiologists, virologists and infectious disease doctors, have begun to define the pandemic as endemic.

- COVID-19 cases had not materially increased within the Rutgers community in the first three weeks of the Fall semester.

- Medical and the New Jersey Department of Health guidance no longer called for face coverings.

- COVID-19-related hospitalizations, intensive care unit beds, ventilator usage, and other key indicators are extremely low and have remained stable in the State of New Jersey.

- The University has exceptionally high vaccination and booster rates due to its mandatory vaccination policies.

- Therapeutics are effective and readily available.

- Mask mandates have been eliminated at virtually all levels in New Jersey, including, for example, in State offices and K-12 school systems.

-The University has a preexisting process for employees who require disability accommodations to request such an accommodation through the University's Office of Employment Equity.

-The University has a robust COVID-19 testing program, which includes all students being able to access up to two COVID-19 tests per week free of charge for any reason or no reason at all.

-Under the revised policy, employees and students were free to continue masking voluntarily.

-Leadership across Rutgers had communicated that continuation of mandatory masking was disruptive and unsustainable for the University community.

[Calcado Certification, ¶10.]

Calcado certifies that "[d]espite relaxing [its] masking rules, [Rutgers] continues to require that all students and employees be fully vaccinated, including boosters (if eligible), unless the student or employee demonstrated eligibility for a medical or religious exemption consistent with applicable federal and/or state law"; that "[a]pproximately 97% of [Rutgers'] faculty, staff, and students are vaccinated against COVID-19 (meaning they have received a primary series of a vaccine approved or authorized for use in the United States by the U.S. Food and Drug Administration and a booster shot, if eligible)"; and "[i]ndividuals who visit campus are similarly required to show proof of vaccination or a negative COVID-19 test under [Rutgers'] Policy." See Calcado Certification, ¶11. Calcado certifies that

“[e]mployees are permitted under current [Rutgers] policy to apply for a disability-related accommodation if they believe the relaxed masking rule poses a health risk to them” and “is in the process of addressing those requests with the employees.” See Calcado Certification, ¶12. Calcado certifies that “[a]ll of the foregoing serves as context for [Rutgers’] decision as announced on September 26 . . . [i.e., g]iven the current state of the COVID-19 pandemic and relevant guidance from public health authorities and governmental entities, and since the mask mandate was causing disruption to [Rutgers’] operations and students’ learning experiences and education, [Rutgers] decided it was in the best interests of the student body to rescind the mandate”; and that “[rescinding the mask mandate] . . . will enable [Rutgers] to better deliver the educational services it provides to its students by ensuring there is less disruption in the classrooms and libraries and that faculty and staff can be better positioned to perform their core job duties and responsibilities (such as educating students) instead of enforcing rules on face coverings.” See Calcado Certification, ¶13.

Rutgers’ Executive Vice Chancellor and Associate Professor of Sociology Sherri-Ann Butterfield (Butterfield) certifies that “[i]n her professional judgment, [Rutgers’] recent decision to eliminate its mask mandate for indoor teaching facilities is in the best interests of [Rutgers]” for the following reasons:

-the relaxation of masking rules outside Rutgers has resulted in lowered masking compliance within Rutgers and faculty members have approached this issue in disparate ways, with some requiring their students to wear masks in accordance with the mandate while others do not require masking notwithstanding the mandate and this disparity has caused frustration among the faculty and student community;

-given that fewer students are wearing masks to class, there is increasing pressure to make masks available to students for use and Rutgers is increasingly having to resupply classrooms and other facilities with masks, which presents administrative challenges to Rutgers that detract from its ability to serve its students in the manner it deems most appropriate;

-complaints from both faculty members (i.e., faculty members complaining that the rules are onerous and difficult to enforce; faculty members threatening to stop teaching in-person classes if the mask mandate was not repealed) and students (i.e., students complaining that masks are not required outside Rutgers) about the mandatory masking rule, and these complaints have increased with the relaxation of masking rules in other areas of public life; and

-expressions of thanks from the Rutgers' community since the September 26, 2022 announcement about the discontinuation of the mask mandate.

[Butterfield Certification, ¶¶3-8.]

Butterfield certifies that "[b]y rescinding the mask mandate, [Rutgers] will be able to decrease, if not eliminate, the disruption to classes and students' education described above" and "[f]or these reasons, and because of the current public health guidance regarding mandatory masking, rescinding the mask mandate is in the best interests of [Rutgers] and the people [it] serve[s]." See Butterfield Certification, ¶¶9-10.

Rutgers' Vice President of University Libraries and

University Librarian Consuella Askew (Askew) certifies that "the libraries at Rutgers serve a critical educational function for students, faculty members, and the public at large"; that "[s]tudents use the libraries for research, learning and other scholastic endeavors", "[f]aculty likewise use the libraries for academic research", and "[t]he public also has access to [Rutgers] libraries and their resources." See Askew Certification, ¶3. Askew certifies that "[i]n recent months, [Rutgers'] masking mandate . . . has become increasingly problematic for the operations of [Rutgers'] libraries" for the following reasons:

- the relaxation of masking rules across other areas of public life has resulted in decreased masking compliance at Rutgers' libraries, with only approximately 40%-60% of library visitors wearing masks in the areas that [Askew] frequently walks through in Alexander Library;

- library staff and faculty do not have the resources to police compliance with mandatory masking given that there are approximately 181 full-time library employees across Rutgers' 11 facilities, as they perform important library-related work such that any time committed towards masking compliance means less time committed towards other, more important library work;

- reduction of masking compliance increasingly places library staff in the position of having to decide whether to abandon their regular work to confront Rutgers' students, faculty/staff, and the public at large about masking or to perform their regular job duties and responsibilities; and

- during a recent Libraries Leadership Team meeting, members of Askew's team specifically requested that masks be considered optional in the libraries and it was noted that masking policy was made at the

university level such that any policy changes would need to come from higher levels of management.

[Askew Certification, ¶¶5-8.]

Askew certifies that “[b]y rescinding the mask mandate, [Rutgers] will be able to decrease, if not eliminate, the disruptions to the operations of the libraries caused by the mask mandate, and personnel in the libraries will be able to devote their time to the regular functions of the libraries instead of policing whether students, employees, and members of the public are complying with masking requirements.” See Askew Certification, ¶9. Askew certifies that “[f]or these reasons, and because of the current public health guidance regarding mandatory masking, rescinding the mask mandate is in the best interest of [Rutgers], its libraries, and the people [it] serve[s].” See Askew Certification, ¶10.

Rutgers’ Assistant Vice Chancellor for Technology and Instruction Paul Hammond (Hammond) certifies that “[i]n his professional judgment, [Rutgers’] recent decision to eliminate its mask mandate for indoor teaching facilities is in the best interests of [Rutgers]” for the following reasons:

-the relaxation of masking rules outside Rutgers has resulted in lowered masking compliance within Rutgers and faculty members have approached this issue in disparate ways, with some requiring their students to wear masks in accordance with the mandate while others do not require masking notwithstanding the mandate and this disparity has caused frustration among the faculty and student community and disruption to classrooms, students’ education, and the student experience at

Rutgers; and

-given that fewer students are wearing masks to class, faculty members are increasingly providing masks to students for use and Rutgers is increasingly having to resupply classrooms and other facilities with masks, which is a drain on Rutgers' resources; [Hammond Certification, ¶¶3-5.]

Hammond certifies that "[b]y rescinding the mask mandate, [Rutgers] will be able to decrease, if not eliminate, the disruption to classes and students' education described above" and "[f]or these reasons, and because of the current public health guidance regarding mandatory masking, it is [his] opinion that rescinding the mask mandate is in the best interest of [Rutgers] and the people [it] serve[s]." See Hammond Certification, ¶¶6-7.

LEGAL ARGUMENTS

AAUP argues that it has satisfied the standard for interim relief. Specifically, AAUP maintains that it has a "reasonable likelihood of success on the merits" given that "[t]here can be nothing more important to a union's representational duties than protecting employee health and safety" and "employer[s] must negotiate over mandatorily negotiable health and safety issues", particularly here where "it is hard to imagine a health and safety issue more critical than this one . . . which has prompted declarations of both State and Federal emergencies and has led to more than one million American deaths." AAUP asserts that "[Rutgers'] September 26, 2022 Policy requires employees to teach

or work in confined indoor spaces even though students and others are now no longer required to wear face coverings, increasing the likelihood of employees' exposure to the deadly and highly contagious COVID-19 virus and the consequences of such exposure on their health and safety, as well as that of other family members they care for and/or who are living in their household"; that "[t]his Policy does nothing to address the additional risk of exposure to employees, including faculty who are immunocompromised and/or who have other medical conditions that put them at greater risk of serious health consequences from an exposure to COVID-19." AAUP argues that "the Policy pulls the rug of safety protections out from underneath . . . [faculty members] four weeks into a fourteen-week semester . . . after they relied on assurances from [Rutgers] policies that face coverings would be required"; that "by lifting the requirement to wear face coverings in teaching spaces, the Policy removes critical protections against exposure that were relied on by faculty members in choosing to teach in-person classes . . . rather than remote classes this semester"; and that "[t]he Policy makes no provision for high-risk faculty members to require that face coverings be worn in their teaching spaces, no provision for remote work for affected employees during the pendency of their requests for accommodation, and no provision to address the specific concerns facing library employees who are subject to the

additional risks of exposure from unvaccinated individuals.” AAUP maintains that “[Rutgers] has refused to negotiate over such matters, claiming that their Policy is non-negotiable.” AAUP contends that “[n]o law or other authority requires that the face covering requirement be lifted in teaching spaces or library facilities” and that “[f]or preemption to apply, there must be no room for debate as to the employer’s discretion on the subject.”^{7/} AAUP also argues that the unions and its members “will suffer irreparable harm” if interim relief is not granted because “[i]f at the conclusion of an unfair practice proceeding, the Commission determines that [Rutgers] violated its duty to negotiate in good faith over the implementation of health and safety issues related to the COVID-19 virus, employees represented by the unions will have been denied the assistance of their union in doing everything possible to secure their health and safety to protect any terms and conditions of employed impacted by this health crisis”; that “[h]ealth and safety is not a matter exclusively within the domain of public employers” and

^{7/} In support of its position, AAUP cites Union Cty., P.E.R.C. No. 84-23, 9 NJPER 588 (¶14248 1983), New Jersey State Judiciary, P.E.R.C. No. 2008-39, 34 NJPER 4 (¶2 2008), Maurice Tp. Bd. of Ed., P.E.R.C. No. 87-91, 13 NJPER 123 (¶18054 1987), Monmouth Cty., P.E.R.C. No. 2021-15, 47 NJPER 224 (¶50 2020), Local 195, IFPTE v. State, 88 N.J. 393, 403-405 (1982), Bethlehem Twp. Bd. of Ed. v. Bethlehem Twp. Ed. Ass’n, 91 N.J. 38, 44 (1982), and Borough of Keyport v. Int’l Union of Operating Eng’rs, 222 N.J. 314, 336-337 (2015).

“unions have a critical role to play in helping protect the employees they represent”; and that “[n]o potential harm is more irreparable” given that “the[se] issues involve matters of life and death.”^{8/} The AAUP also argues that “[t]he prejudice suffered by the unions if . . . restraints do not issue will be far greater than any prejudice suffered by [Rutgers]”; that “there is no harm to [Rutgers] negotiating in good faith” particularly regarding “mandatorily negotiable terms and conditions of employment”; and that “the requirement for face coverings has been in continued effect throughout multiple semesters” such that “granting the . . . restraints would be consistent with maintaining critically important portions of the status quo during the pendency of this dispute.” The AAUP also argues that “[t]he public interest is served by the prompt settlement of labor disputes and the avoidance of labor strife” because it “promotes the health, welfare, comfort and safety of the people of the State, including public employees”; that “[Rutgers’] actions run directly contrary to the policy declaration in the [Act]” because “[d]enying employees their statutory right to negotiate over health and safety protections and other issues touching upon their terms and conditions of employment during this moment of unprecedented crisis . . .

^{8/} In support of its position, AAUP cites Crowe v. DeGioia, 90 N.J. 126, 132-133 (1982).

undermines the ability of the unions and [Rutgers] to peacefully resolve work place and other disputes” and “threatens employee health and safety.”^{9/}

In response, initially Rutgers asserts that AAUP’s “filing [was] restricted to information concerning the AAUP-AFT unit”; that “[n]either [AAUP-BHSNJ nor PTL AAUP-AFT] submitted any evidence as to their membership, their health risks, or anything else”; and that accordingly, the temporary restraints must be vacated as to AAUP-BHSNJ and PTL AAUP-AFT. Rutgers also argues that AAUP has not satisfied the standard for interim relief. Specifically, Rutgers maintains that AAUP cannot show a substantial likelihood of success on the merits for three reasons - “Rutgers had a managerial prerogative to amend its masking policy”; “[AAUP’s] charge and proposed relief relates almost exclusively to the actions of non-negotiations unit members; and issues of fact pervade [AAUP’s] filing” Regarding its managerial prerogative argument, Rutgers contends that “[p]ublic employers have a managerial prerogative to determine educational policy” and “to promulgate and modify COVID-19 safety rules”; that “[t]he temporary restraints . . . completely disregard these management rights” because they “repeal [Rutgers’] COVID-19 policy amendments” and “implement a new COVID-19 policy that vests negotiations unit members with the authority to decide on

^{9/} In support of its position, AAUP cites N.J.S.A. 34:13A-2.

an individualized basis whether masks will be required in classrooms"; and that although "[t]he legal authority cited by [AAUP] . . . relates to the negotiability of safety matters", "none of [those] cases . . . involved COVID-19 protocols or . . . the interaction between COVID-19 protocols and a public university's educational policy decisions" and same do not account for "the Appellate Division . . . expressly reject[ing] efforts by labor unions to engage in negotiations regarding safety issues associated with COVID-19 policy decisions." Rutgers asserts that "[AAUP] [has] presented no competent evidence that the relaxation of masking rules will cause any safety issue" despite the fact that "CDC and State health authorities no longer require indoor masking", "Governor Murphy has announced that masking is no longer necessary in schools" and "expressly eliminated masking for K-12 schools", "[e]very relevant Executive Order regarding masking has been repealed", and "virtually all businesses and places of public accommodation have dispensed with mask mandates." Rutgers notes that AAUP "[has] identified just five negotiations unit members (presented to the Commission by way of an incompetent, hearsay certification) who allegedly have medical issues which heighten their risk of COVID-19 complications", but AAUP "[has] failed to explain why these individuals cannot take steps to protect themselves from COVID-19 through vaccination, masking, social

distancing, protective barriers, etc.", "[has failed to] explain[] how these individuals are able to function outside Rutgers' classrooms and libraries . . . where masking rules are virtually non-existent", and "[has failed to] explain[] why two of the three allegedly immunocompromised [unit] members have not yet requested from Rutgers any accommodations relating to their medical issues." Rutgers claims that "[AAUP's] argu[ment] that changes to [Rutgers'] masking rules are negotiable because faculty members relied on the prior policy requiring masks in choosing to teach in-person classes rather than remote classes this semester" must be rejected "because it presumes faculty members had the right to decide whether to teach classes remotely" and "conflicts directly with the Commissions' historical recognition of the managerial right to determine curriculum"; that "alleged 'detrimental reliance' does not transform a management right into a negotiable subject matter." Rutgers also claims that "[AAUP] presented no competent evidence from which to conclude faculty members reasonably relied upon prior COVID-19 policies in deciding to accept in-person teaching assignments for the Fall 2022"; that "[AAUP] do[es] not explain why these faculty members believed the policies could not change when [Rutgers'] COVID-19 policies have been dynamic throughout the pandemic"; and that "[AAUP] do[es] not explain . . . why all but one of [the] faculty members identified in their

certifications failed to seek accommodations from Rutgers since the policy changes were announced." Regarding its argument that the Commission lacks jurisdiction with respect to the actions of non-negotiations unit members, Rutgers contends that "[n]either PERC nor [AAUP] have the authority to legislate or dictate the conduct of non-unit members" given that "PERC [has] consistently refused to permit labor unions to negotiate regarding the conduct of non-negotiations unit members"; and yet "[the temporary restraints] force[] non-negotiations unit library visitors to wear masks (and, by implication, forces library staff members to abandon their normal duties to police masking compliance)" and "authorize[] faculty members to require non-negotiations unit students to wear masks (and, by implication, forces [Rutgers] officials to ensure more consistent application of the mandate in classes)." Regarding its argument that there are disputed material facts, Rutgers disputes the following:

-AAUP's claim "that the elimination of mandatory masking removed a significant level of protection with respect to COVID-19" particularly given that AAUP "provide[s] no citation or factual basis for this statement" (i.e., while conceding that "masking was once widely considered a necessary precaution against COVID-19", Rutgers maintains that "the CDC and public health officials no longer require it"; that "Governor Murphy himself stated in connection with his decision to eliminate mandatory masking in K-12 schools . . . [that] we have reached a point where we feel confident that we can take another step toward normalcy for our kids . . . [and] responsibly end the universal mask mandate"; and that "[Rutgers] community members are even more protected than those in K-12 schools" given that "vaccination [is] mandatory at Rutgers");

-AAUP's claim "that faculty members reasonably relied on prior masking rules in making decisions as to which classes they would teach the following semester" particularly given that AAUP "submitted no competent evidence to support this assertion" and "no medical documentation, doctors' records, or anything else relating to the health risks of their members or their decisions to accept employment"; and

-AAUP's claim that "[Rutgers] provided virtually no advanced notice and no opportunity to negotiate the changes to the masking policy" (i.e., while conceding that it "did not negotiate . . . [and] was under no obligation to do so", Rutgers maintains that it "met with [AAUP] on September 29, 2022 and September 30, 2022" and that "[d]uring [those] meetings, [AAUP] had ample opportunity to express [its] views regarding the policy"; that there is "no assertion . . . that [Rutgers] prevented a full discussion of nay issues [AAUP] raised at the meeting[s]").

Rutgers claims that "[e]ach of these disputed factual issues prevents the Commission from ordering interim relief in this matter."^{10/}

^{10/} In support of its position, Rutgers cites In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12 (App. Div. 1977), Bd. of Educ. of Woodstown-Pilesgrove Reg'l Sch. Dist. v. Woodstown-Pilesgrove Reg'l Educ. Ass'n, 81 N.J. 582, 591 (1980), In re City of Newark, 469 N.J. Super. 366 (App. Div. 2021), Mt. Olive Tp., P.E.R.C. No. 2022-49, 49 NJPER 33 (¶6 2022), Edison Tp., P.E.R.C. No. 2021-31, 47 NJPER 375 (¶88 2021), North Hudson Reg'l Fire & Rescue, P.E.R.C. No. 2023-5, 49 NJPER 122 (¶27 2022), Maplewood Tp., P.E.R.C. No. 2023-8, NJPER ___ (¶__ 2022), Essex Cty. Coll., P.E.R.C. No. 2007-46, 33 NJPER 19 (¶8 2007), Burlington Cty. Coll., P.E.R.C. No. 2010-38, 35 NJPER 439 (¶144 2009), Middlesex Cty. Coll., P.E.R.C. No. 78-13, 4 NJPER 47 (¶4023 1977), North Plainfield Bd. of Ed., P.E.R.C. No. 83-103, 9 NJPER 136 (¶14064 1983), recon. den. P.E.R.C. No. 83-120, 9 NJPER 208 (¶14096 1983), aff'd NJPER Supp.2d 139 (¶120 App. Div. 1983), City of Asbury Park, P.E.R.C. No. 79-101, 5 NJPER 260 (¶10148 1979), Florham Park Bd. of Ed., P.E.R.C. No. 93-64, 19 NJPER 117 (¶24056 1993), Crowe v. DeGioia, 90 N.J. 126, (continued...)

Rutgers also argues that AAUP “cannot demonstrate [that it] will suffer irreparable harm if the requested relief is not granted.” Rutgers asserts that AAUP “submitted no admissible scientific, medical, or other evidence to support their generalized claims . . . [that] the new policy will increase the likelihood of Rutgers’ faculty members contracting or suffering complications from COVID-19”; and “[t]he absence of a certification from any immunocompromised employee - or other competent evidence relating to the alleged increased risk caused by the policy change - in and of itself commands the denial of interim relief.” Rutgers maintains that “even if . . . [AAUP’s] hearsay certifications . . . [are considered], those documents are woefully deficient” given that AAUP “[has] identified just four faculty members and one librarian who are allegedly at risk of complications from COVID-19” and “[has] not explained . . . why these individuals cannot wear a mask, or use social distancing, or rely upon vaccinations, or take other precautions to protect themselves against COVID-19”, “[has not] explained how these individuals are able to function outside of Rutgers . . . where most of the population interacts without masks”, and “[has not] explained why only one of these employees has sought an

10/ (...continued)
134 (1982), Citizens Coach Co. v. Camden Horse R.R. Co., 29 N.J. Eq. 299, 305-306 (E & A 1878), Newark State-Operated Sch. Dist., I.R. No. 2014-5, 41 NJPER 33 (¶8 2014), and Union Cty., I.R. No. 2013-7, 39 NJPER 394 (¶125 2013).

accommodation from Rutgers relating to her medical issues.”

Rutgers concedes that “some of its faculty members likely have medical issues”, but highlights that “this is precisely why Rutgers has a robust written process through which all of its employees can seek disability accommodations”; and that “[this] process ensures that individuals with medical issues and other disabilities enjoy the same access to . . . employment as non-disabled individuals.” Rutgers contends that “[t]he existence of this [disability accommodation] process . . . eliminates the irreparable harm issue because it provides immunocompromised negotiations unit members with a means to work with [Rutgers] officials to protect themselves.”^{11/} Rutgers also argues that AAUP “[has] failed to demonstrate that the relative hardship [that] it will suffer outweighs the harm Rutgers will incur if relief is granted” and “has failed utterly to demonstrate injury to the public interest if the requested relief is not granted.” Rutgers maintains that “the temporary restraining order significantly harms [Rutgers]” because it “grossly infringes upon [its] managerial rights . . . [and] forces non-negotiations unit members (Rutgers students and community members) to wear masks in classrooms and libraries, notwithstanding that [Rutgers] decided

^{11/} In support of its position, AAUP cites Sussex Cty. Bd. of Freeholders, I.R. No. 2003-19, 29 NJPER 274 (¶81 2003), Verona Bd. of Ed., I.R. No. 2009-4, 34 NJPER 264 (¶94 2008), and Hillside Tp., I.R. No. 2004-4, 29 NJPER 378 (¶119 2003).

as a matter of educational policy that such a rule is no longer appropriate"; and "[i]t transfers from [Rutgers] to individual faculty members the ability to require or not require masks . . . and the ability to set policy." Rutgers also maintains that "AAUP [has made] no effort to demonstrate how the granting of interim relief would further the public interest" and asserts that "[e]njoining a party is not the prompt settlement of [a] dispute[]", but rather in this instance would be "forcing a party to act in a particular way regardless of the complete lack of admissible evidence justifying such imposition." Rutgers contends that "[a]s a public university, [it] determines the 'public interest' concerning public education" and "has determined [in this instance that] the public interest requires the relaxation of its masking rules in classrooms and libraries"; and that "there is no public interest in allowing [AAUP] and [its] members to dictate issues of educational and COVID-19 policy."^{12/}

In reply, AAUP reiterates its contention that "no logical and plausible argument can be made that continuing to require face coverings in [indoor teaching spaces and libraries] was inconsistent with, or detrimental to, public health" and "the virtues of masking, and the dramatically increased effectiveness

^{12/} In support of its position, Rutgers cites Crowe v. DeGioia, 90 N.J. 126, 132-134 (1982) and In re Block, 50 N.J. 494, 495 (1967).

of two-way masking are well-known within the scientific community and the public alike, so much so that [Rutgers] has required face coverings by all employees and students, as well as others, over multiple years since the beginning of their COVID-19 protocols." AAUP maintains that "the simple fact that masks are no longer mandated by the CDC or by the State [of New Jersey] says nothing about the effectiveness of a face covering requirement"; and it "is undisputed that [Rutgers] still maintains a mask requirement in clinical settings . . . [and] there is an obvious and undisputed health and safety reason for that." AAUP claims that Rutgers' "disability accommodation . . . process . . . is woefully inadequate to address the health and safety concerns raised by [AAUP]" because "even in instances where an accommodation is granted, let alone instances where it is denied, it can often take weeks for the process to play out"; that employees "are required to fill out forms, have their health care provider complete additional paperwork . . . , and attend interactive process interviews with appropriate personnel from [Rutgers], as well as to provide additional clarifying documentation when necessary." AAUP also claims that "the accommodation process would also be futile in addressing many of the health and safety concerns of employees related specifically to COVID-19" - e.g., "many employees live with and/or otherwise care for individuals who are medically compromised or otherwise

at greater risk from exposure to COVID-19" and "the accommodation process would not cover these health and safety concerns" because it only applies "based on [an employee's] own medical condition"; and "employees requesting an accommodation for their own health and safety concerns, such as factors that put them at increased risk from exposure to COVID-19 but who are not immunocompromised, could be denied an accommodation." AAUP asserts that "the accommodation process is not a comprehensively viable option through which to address employee concerns . . . in lieu of negotiating the policy's implications on health and safety." AAUP argues that in the cases cited/relied upon by Rutgers, "the issue involved a managerial prerogative to adopt policies designed to increase employee health and safety and/or that of the public"; and that "[b]y contrast, [Rutgers'] unilateral policy change decreases health and safety protections by removing measures designed to ensure the health and safety of employees and/or that of the public by lifting the requirement to wear face coverings in indoor teaching spaces and libraries." AAUP contends that "the relief requested and the restraints granted vis-a-vis library employees is essentially an injunction of the applicable provisions of the policy"; that "the Commission has broad remedial authority . . . and can fashion an appropriate remedy under the circumstances"; that the "relief requested and the restraints granted appropriately balance [Rutgers'] desired

outcome in implementing the policy with the immediate health and safety concerns raised by [AAUP]", "preserves significant portions of the policy", and "is grounded in principles that are consistent with maintaining the status quo . . . especially in light of the fact that the face covering requirement was already in place for years in indoor teaching spaces and libraries . . . prior to the issuance of the policy, including at the beginning of this semester." AAUP maintains that it "[is] not claiming that faculty members enjoy a general and blanket right to teach any class they want remotely" but "[r]ather, employees have some say in what classes they are going to teach, in certain programs there is the potential for employees to explore such remote options with their program director, and in certain instances an accommodation could be requested if enough lead time was provided"; that "there are steps . . . employees could have taken to protect themselves and/or their medically compromised family members . . . which they are no longer able to avail themselves of after they were surprised by a policy change that was slated to go into effect less than one week after its issuance." AAUP also maintains that it "[is] simply seeking to negotiate over the health and safety implications of the removal of an existing mask requirement under the policy on unit employees" and the fact that "continuation of a face covering requirement that has been in effect for multiple years has some indirect . . . impact on

students or other members of the public . . . does not mean that [AAUP] [is] seeking to negotiate on their behalf or render the subject non-negotiable"; and AAUP "do[es] not seek negotiations over the health and safety impact on students and on the public, nor over the ability of students to seek to have the rest of their class members wear masks." AAUP concedes that "the only harm identified by [Rutgers] is to its managerial prerogative to set educational policy" but argues that "[i]n light of significant safety implications, the balance of the hardships weigh heavily in favor of granting interim relief."^{13/}

STANDARD OF REVIEW

To obtain interim relief, the moving party must demonstrate that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted; in certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief. Further, the public interest must not be

^{13/} In support of its position, AAUP cites City of Newark, 469 N.J. Super. 366 (App. Div. 2021), Maplewood Tp., P.E.R.C. No. 2023-8, ___ NJPER ___ (¶ 2022), Mt. Olive Tp., P.E.R.C. No. 2022-49, 49 NJPER 33 (¶6 2022), North Hudson Reg'l Fire & Rescue, P.E.R.C. No. 2023-5, 49 NJPER 122 (¶27 2022), Edison Tp., P.E.R.C. No. 2021-31, 47 NJPER 375 (¶88 2021), Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n of Educational Secretaries, 78 N.J. 1, 9 (1978), and Teaneck Tp. v. Teaneck FMBA Local No. 42, 353 N.J. Super. 298, 299 (App. Div. 2002), aff'd o.b. 177 N.J. 560 (2003).

injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. See Crowe v. DeGioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); Burlington Cty., P.E.R.C. No. 2010-33, 35 NJPER 428 (¶139 2009) (citing Ispahani v. Allied Domecq Retailing United States, 320 N.J. Super. 494 (App. Div. 1999) (federal court requirement of showing a substantial likelihood of success on the merits is similar to Crowe)); State of New Jersey (Stockton College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975). In Little Egg Harbor Tp., the Commission Designee stated:

[T]he undersigned is most cognizant of and sensitive to the extraordinary nature of the remedy sought to be invoked and the limited circumstances under which its invocation is necessary and appropriate. The Commission's exclusive remedial powers, normally intended to be exercised subsequent to a plenary hearing, will not be called into play for interim relief in advance of such hearing except in the most clear and compelling circumstances.

N.J.S.A. 34:13A-5.3, entitled "Employee organizations; right to form or join; collective negotiations; grievance procedures," provides in pertinent part:

Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982),

articulated the standards for determining whether a subject is mandatorily negotiable:

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.

Public employers are prohibited from "[i]nterfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act." N.J.S.A. 34:13A-5.4a(1). "It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification." State of New Jersey (Corrections), H.E. 2014-9, 40 NJPER 534 (¶173 2014) (citing New Jersey College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421 (¶4189 1978)). The Commission has held that a violation of another unfair practice provision derivatively violates subsection

5.4a(1). Lakehurst Bd. of Ed., P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004).

Public employers are also prohibited from “[r]efusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. . . .” N.J.S.A. 34:13A-5.4a(5). A determination that a party has refused to negotiate in good faith will depend upon an analysis of the overall conduct and attitude of the party charged. Teaneck Tp., P.E.R.C. No. 2011-33, 36 NJPER 403 (¶156 2010). The Commission has held that “a breach of contract may also rise to the level of a refusal to negotiate in good faith” and that it “ha[s] the authority to remedy that violation under subsection a(5).” State of New Jersey (Dep’t of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

ANALYSIS

At issue in this interim relief application is whether a public employer has a managerial prerogative to unilaterally rescind/modify its pre-existing COVID-19 mitigation policies (e.g., required face coverings) in the face of a union’s demand to negotiate the impact of same based upon concerns about diminished employee health/safety despite the existence of a workplace disability and reasonable accommodation policy.

(A) Likelihood of Success

I find that a determination regarding whether AAUP has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations is unclear.

1. Factual Allegations

It is undisputed that despite specifying on August 16, 2022 that its "Fall Semester 2022 Health & Well-Being Protocols" would require face coverings in all indoor teaching spaces, libraries, and clinical settings (Butterfield Certification, Ex. A; Givan Certification, ¶2), Rutgers reversed course mid-semester (September 26, 2022 announcement) and as of October 1, 2022 has eliminated the requirement for face coverings in indoor teaching spaces and libraries but continues to require face coverings in all clinical settings (Calcado Certification, ¶¶8-9, Ex. A; Givan Certification, ¶5). Notably, Rutgers' August 16, 2022 policy guidance did not include a disclaimer that now appears in its September 26, 2022 announcement - i.e., "as the pandemic remains fluid, the university is prepared to revisit this change in protocol should future public health conditions warrant." See Calcado Certification, Ex. A. It is also undisputed that after receiving AAUP's demand to negotiate regarding the health/safety impact of its modification/rescission, Rutgers met with AAUP on September 29-30, 2022 but refused to negotiate. See Mercado-Hak Certification, ¶¶4-11, Ex. A.

Despite providing the basis for its COVID-19 protocol

modification/rescission regarding face coverings (i.e., medical experts defining the pandemic as endemic; COVID-19 cases have not materially increased within Rutgers; medical and New Jersey Department of Health guidance no longer calls for face coverings; COVID-19-related hospitalizations are low and have remained stable in New Jersey; high vaccination/booster rates at Rutgers; availability of therapeutics; elimination of mask mandates in State offices and K-12 school systems; pre-existing Rutgers' disability accommodation policy; robust testing program at Rutgers; employees/students at Rutgers remain free to mask; continuation of mandatory masking was disruptive and unsustainable for Rutgers), Rutgers has not directly disputed that face coverings are effective and/or necessary to mitigate the spread of COVID-19 particularly for a certain segment of the population (i.e., unit members who are immunocompromised, live with someone who is immunocompromised, or for other good cause). See Calcado Certification, ¶10. On the other hand, AAUP (vis-a-vis Dr. Monteleone's certification) has provided direct evidence that "masks are still a valuable tool in preventing the spread of COVID-19 on Rutgers' campuses and are even more effective when both persons whom encounter one another are wearing them"; and that Rutgers' "change to the mask mandate in non-clinical settings would pose a serious health risk to" individuals who "are at high-risk for COVID-19 mortality either due to age,

immunosuppression, or other factors and who work in classrooms and other locations that are not clinical settings.” See Monteleone Certification, ¶¶1-3.

I take administrative notice that effective March 7, 2022, Governor Murphy lifted the universal school mask mandate for students, staff, and/or visitors in schools (K-12) and childcare centers.^{14/} See N.J.A.C. 19:14-6.6(a) (“[n]otice may be taken of administratively noticeable facts”). I also take administrative notice that effective April 18, 2022, the Centers for Disease Control and Prevention’s (CDC) January 29, 2021 order requiring masks on public transportation conveyances and at transportation hubs is no longer in effect due to a court order; that CDC “no longer recommends universal indoor mask wearing in K-12 and early education settings in areas with low or medium COVID-19 Community Level”; but that CDC “continues to recommend that people wear masks in indoor public transportation settings at this time.”^{15/} I take administrative notice that “[s]ome people who are immunocompromised (have a weakened immune system) are more likely to get sick with COVID-19 or be sick for a longer period”; and

^{14/} See
<https://www.nj.gov/governor/news/news/562022/20220207a.shtml>
;
<https://www.nj.gov/health/news/2022/approved/20220207d.shtml>

^{15/} See
<https://www.cdc.gov/quarantine/masks/mask-travel-guidance.html>

"[i]f you or someone you live or spend time with is immunocompromised, it is important to have a COVID-19 plan to protect yourself from infection and prepare for what to do if you get sick."^{16/} Finally, I take administrative notice that some segment of the scientific/medical community (e.g., the Mayo Clinic; CDC) continues to specify that "[f]ace masks combined with other preventive measures, such as getting vaccinated, frequent hand-washing and physical distancing, can help slow the spread of . . . COVID-19"; and recommends that "[i]f you have a weakened immune system or have a higher risk of serious illness, wear a mask that provides you with the most protection possible when you're in an area with a high number of people with COVID-19 in the hospital and new COVID-19 cases" and to "[c]heck with your healthcare provider to see if you should wear a mask when you're in an area with a lower number of new COVID-19 cases and people with COVID-19 in the hospital."^{17/}

Accordingly, it appears that there are no material factual

^{16/} See <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-who-are-immunocompromised.html#:~:text=Some%20people%20who%20are%20immunocompromised,sick%20for%20a%20longer%20period.>

^{17/} See <https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-mask/art-20485449;> <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-who-are-immunocompromised.html#:~:text=Some%20people%20who%20are%20immunocompromised,sick%20for%20a%20longer%20period.>

disputes and that AAUP has a likelihood of prevailing on its factual allegations. However, given the parties' recent divergent perspectives on the effectiveness and/or necessity of face coverings to mitigate the spread of COVID-19 and the enduring public controversy regarding same, I find that a determination regarding whether AAUP has a substantial likelihood of prevailing in a final Commission decision on its factual allegations is unclear. Compare, e.g., City of Newark, I.R. No. 2021-7, 47 NJPER 164 (¶38 2020) (denying application for interim relief where there were "material factual disputes"); Town of Boonton, I.R. No. 2020-1, 46 NJPER 30 (¶9 2019) (denying application for interim relief where there were "material factual disputes"); Kean University, I.R. No. 2009-5, 34 NJPER 232 (¶80 2008) (denying application for interim relief where there were "several disputes of material fact[]"); Closter Bor., I.R. No. 2007-10, 33 NJPER 101 (¶35 2007) (denying application for interim relief where "the record show[ed] a dispute on a material fact").

2. Legal Allegations

The Commission has "recogni[zed] . . . the difficulty of squaring proper recognition of the exercise of managerial prerogatives by public employers with the duty of public employers under [the] Act to negotiate safety issues." City of East Orange, P.E.R.C. No. 81-11, 6 NJPER 378 (¶11194 1980), aff'd NJPER Supp.2d 100 (¶82 App. Div. 1981), certif. den. 88 N.J. 476

(1981); accord City of Elizabeth, P.E.R.C. No. 92-106, 18 NJPER 262 (¶23109 1992) (the Commission “[is] charged with balancing the employer and employees’ respective interests . . . considering the facts of each case”). The Commission has held that “employees covered by collective negotiations agreements [have] the ability to address safety concerns to their employer, as such issues [are] mandatory subjects of negotiations.” West Deptford Tp. Bd. of Ed., P.E.R.C. No. 99-68, 25 NJPER 99 (¶30043 1999); accord State of New Jersey (Dep’t of Corrections), P.E.R.C. No. 2020-37, 46 NJPER 324 (¶79 2020) (“disputes under contractual safety clauses are legally arbitrable, but . . . an award could not order an increase in staffing or a reversal of . . . policy . . . [that] would substantially interfere with [an employer’s] managerial prerogative”); State of New Jersey (Greystone), P.E.R.C. No. 89-85, 15 NJPER 153 (¶20062 1989) (denying a restraint of binding arbitration of a grievance “assert[ing] that ending security guard services made . . . [an] [o]ffice unsafe”). However, “grievance[s] [that] seek[] to prevent [an] employer from implementing a decision to increase employee safety” are not mandatorily negotiable. City of Elizabeth; accord City of Newark, P.E.R.C. No. 97-153, 23 NJPER 400 (¶28184 1997) (“employer had prerogative to take action to improve employee safety”).

More recently in the context of COVID-19 health/safety

issues, a Commission Designee assessed a public employer's unilateral implementation of a policy requiring unit employees who were potentially exposed to COVID-19 or recently traveled to states with significant community spread of the disease to report to work during their quarantine period; and the union's assertion that such policy risked exposing other employees to COVID-19.

See Monmouth Cty., I.R. No. 2021-4, 47 NJPER 116 (¶29 2020), recon. den. P.E.R.C. No. 2021-15, 47 NJPER 224 (¶50 2020).

Ultimately, the Commission refused to reconsider the Designee's determination partially granting interim relief and restraining the public employer from requiring employees to work during their quarantine period given that the public employer previously determined it was feasible to allow those positions to work from home. Id.

However, New Jersey courts and the Commission have also recently held that public employers have a managerial prerogative to unilaterally implement the following:

-COVID-19 vaccination policies, including those with no testing alternative (City of Newark, 469 N.J. Super. 366 (App. Div. 2021); Maplewood Tp., P.E.R.C. No. 2023-8, ___ NJPER ___ (¶__ 2022));

-COVID-19 mitigation policies (Mt. Olive Tp., P.E.R.C. No. 2022-49, 49 NJPER 33 (¶6 2022); North Hudson Reg'l Fire & Rescue, P.E.R.C. No. 2023-5, 49 NJPER 122 (¶27 2022)); and

-COVID-19 travel quarantine policies barring employees from reporting to work during a quarantine period (Edison Tp., P.E.R.C. No. 2021-31, 47 NJPER 375 (¶88 2021)).

Given the legal precepts set forth above, it is also uncertain as to whether AAUP has a substantial likelihood of prevailing on its legal allegations. Although New Jersey courts and the Commission have found a managerial prerogative to unilaterally implement COVID-19 policies that enhance employee health/safety, they have not specified whether that prerogative also encompasses the rescission/modification of pre-existing COVID-19 mitigation policies - particularly when/if the impact of same diminishes employee health/safety. See, e.g., Monmouth Cty., I.R. No. 2021-4, 47 NJPER 116 (¶29 2020), recon. den. P.E.R.C. No. 2021-15, 47 NJPER 224 (¶50 2020). Nor have they explored, particularly in the context of higher education, how the managerial prerogative to determine educational policy interacts with the rescission/modification of pre-existing COVID-19 mitigation policies - particularly when/if the impact of same diminishes employee health/safety.

Thus, it appears that AAUP's legal allegations may raise novel legal questions that are more appropriate for a plenary hearing and Commission review than to be initially decided via an application for interim relief. Some of those questions include the following:

- whether the Commission finds that a public employer's managerial prerogative to unilaterally implement COVID-19 mitigation policies also implicitly includes the managerial prerogative to unilaterally rescind/modify same;

-whether the Commission finds that the health/safety impact of a public employer's unilateral rescission/modification of pre-existing COVID-19 mitigation policies is severable and mandatorily negotiable or not, particularly when there is enduring public controversy regarding the continuing effectiveness and/or necessity of that mitigation tool (e.g., face coverings); and

-how the Commission shapes the contours of the interaction between a public employer's managerial prerogative to determine educational policy (in the context of higher education) with a public employer's rescission/modification of pre-existing COVID-19 mitigation policies, particularly when/if the impact of same diminishes employee health/safety (e.g., increased exposure to COVID-19 for unit members who are immuno-compromised, live with someone who is immuno-compromised, or for other good cause).

Compare, e.g., Ocean Cty., I.R. No. 2020-24, 47 NJPER 1 (¶1 2020) (denying an application for interim relief based, in part, upon "legal allegations [that] raise several questions that are more appropriate for a plenary hearing and Commission review than to be initially decided via an application for interim relief"); Town of Boonton, I.R. No. 2020-1, 46 NJPER 30 (¶9 2019) (denying an application for interim relief based, in part, upon the unclear legal effect -- if any - of allegedly ratifying a memorandum of agreement during closed session); City of Orange, I.R. No. 2005-10, 31 NJPER 130 (¶56 2005) (denying, in part, an application for interim relief where there was "a novel issue of law that [was] more appropriate for a plenary hearing and Commission review than to be initially decided in interim relief"); Middlesex Cty., I.R. No. 88-10, 14 NJPER 153 (¶19062

1988) (denying an application for interim relief where “complex and novel legal issues [had] been presented . . . [that] can only be resolved at a plenary hearing”).

(B) Irreparable Harm

I find that AAUP has established irreparable harm based upon the fact that Rutgers unilaterally rescinded/modified a working condition mid-semester while the parties are in negotiations for successor agreements (i.e., AAUP-AFT, AAUP-BHSNJ, and PTL AAUP-AFT are all parties to expired CNAs with Rutgers). See 2018-2022 AAUP-AFT CNA, 2018-2022 AAUP-BHSNJ CNA; 2018-2022 PTL AAUP-AFT CNA; see also N.J.S.A. 34:13A-5.3.

New Jersey courts and the Commission have held that “employers are barred from ‘unilaterally altering mandatory bargaining topics, whether established by expired contract or by past practice, without first bargaining to impasse.’” In re Atlantic Cty., 230 N.J. 237, 252 (2017) (citing Bd. of Educ. v. Neptune Twp. Educ. Ass’n, 144 N.J. 16, 22 (1996)); accord Galloway Twp. Bd. of Educ. v. Galloway Twp. Educ. Ass’n, 78 N.J. 25, 48 (1978) (finding that the Legislature, through enactment of the Act, “recognized that the unilateral imposition of working conditions is the antithesis of its goal that the terms and conditions of public employment be established through bilateral negotiation”; finding that unilaterally changing terms and conditions of employment by a public employer “ha[s] the effect

of coercing its employees in their exercise of the organizational rights guaranteed them by the Act because of its inherent repudiation of and chilling effect on the exercise of their statutory right to have such issues negotiated on their behalf by their majority representative"); Closter Bor., P.E.R.C. No. 2001-75, 27 NJPER 289 (¶32104 2001) (holding that "[u]nilateral changes in [mandatorily negotiable terms and conditions of employment] violate the obligation to negotiate in good faith" and "can shift the balance of power in the collective negotiations process"; holding that "[i]f a change occurs during contract negotiations, the harm is exacerbated"). In Galloway, a decision cited with approval by the Appellate Division for the same proposition set forth below, the New Jersey Supreme Court noted that unilateral employer action with respect to mandatorily negotiable subjects has a "coerc[ive]" and "chilling effect":

Indisputably, the amount of an employee's compensation is an important condition of his employment. If a scheduled annual step increment in an employee's salary is an "existing rule governing working conditions," the unilateral denial of that increment would constitute a modification thereof without the negotiation mandated by N.J.S.A. 34:13A-5.3 and would thus violate N.J.S.A. 34:13A-5.4a(5). Such conduct by a public employer would also have the effect of coercing its employees in their exercise of the organizational rights guaranteed them by the Act because of its inherent repudiation of and chilling effect on the exercise of their statutory right to have such issues negotiated on their behalf by their majority representative.

[Galloway, 78 N.J. at 49.]

Accord In re Atlantic Cty., 445 N.J. Super. at 17-18 (noting that “even if the Court’s analysis in Galloway was no more than dictum unnecessary to the ultimate ruling applying N.J.S.A. 18A:29-4.1, we must follow it”).

Even assuming, arguendo, that a determination regarding whether AAUP has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations is unclear as set forth above, I find that AAUP has established irreparable harm based upon the fact that increased exposure to COVID-19 for unit members who are immunocompromised, live with someone who is immunocompromised, or for other good cause creates a greater risk of death or life-threatening illness for those individuals.

“Irreparable harm will be found in an unfair practice case where the Commission is unable to fashion an adequate, effective remedy at the conclusion of the plenary proceeding in that case.” Brick Tp. Bd. of Ed., I.R. No. 2011-31, 37 NJPER 39 (¶13 2011). “In certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief.” Crowe, 90 N.J. at 133; accord Jackson Tp., I.R. No. 2018-3, 44 NJPER 176 (¶53 2017).

Here, AAUP has demonstrated that Rutgers’ mid-semester rescission/modification of its pre-existing COVID-19 mitigation

policy requiring face coverings in indoor teaching spaces and libraries increases the exposure to COVID-19 for unit members who are immunocompromised, live with someone who is immunocompromised, or for other good cause; and that, in turn, creates a greater risk of death or life-threatening illness.^{18/} See Walker Certification, ¶¶4-9; Lawrence Certification, ¶2; Chebel Certification, ¶2; Scott Certification, ¶2; Shinbrot Certification, ¶2; Marchi Certification, ¶2; Roseman Certification, ¶2; Sidorick Certification, ¶¶1-7; Monteleone Certification, ¶¶1-5.

Although Rutgers refers to "Disability and Reasonable Accommodation Policy" (University Policy Section # 60.1.34) as the proper avenue of redress for "at-risk" unit members, same appears to be inadequate to address the situation created by Rutgers' mid-semester rescission/modification. AAUP (vis-a-vis Dr. Monteleone's certification) has provided direct evidence that "AAUP-BHSNJ has often assisted unit members who have been denied reasonable accommodations since Rutgers routinely claims that granting reasonable accommodations is an 'undue burden'" and that "[she] has grave concerns that relying solely on a reasonable

^{18/} See

<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-who-are-immunocompromised.html#:~:text=Some%20people%20who%20are%20immunocompromised,sick%20for%20a%20longer%20period;>

<https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-mask/art-20485449>

accommodation process to enable continued mask wearing would result in many of our members being put at further risk COVID-19 exposure." See Monteleone Certification, ¶4.

Moreover, despite my inquiries before and during oral argument, Rutgers was unable to specify what will happen to immunocompromised employees who apply for a reasonable accommodation during the processing/pendency of their application (i.e., will they be required to continue working in the same manner, thereby at greater risk for increased exposure to COVID-19); Rutgers was unable to specify whether it would accept and consider applications from employees who live with someone who is immunocompromised given that the reasonable accommodation policy only applies to employee disabilities; and Rutgers was unable to specify whether it would accept and consider applications for other good cause pertaining to instances where despite not being immunocompromised, increased exposure to COVID-19 creates greater health risks for employees and/or those they live with. Compare Monmouth Cty., I.R. No. 2021-4, 47 NJPER 116 (¶29 2020), recon. den. P.E.R.C. No. 2021-15, 47 NJPER 224 (¶50 2020).

Rutgers' claim that AAUP must demonstrate how/why other mitigation strategies do not obviate any increased exposure to COVID-19 implies that Rutgers' mid-semester rescission/modification does in fact create increased exposure absent additional measures. It also conflicts with Rutgers' claim that

the relief proposed by AAUP and the temporary restraining order (TRO) issued on October 3, 2022 (i.e., restraining Rutgers from eliminating the requirement that face coverings be worn in all library facilities; and restraining Rutgers from restricting the discretion of "at risk" unit members who are teaching in-person classes to require that face coverings be worn in all indoor teaching spaces) is beyond the Commission's authority because it imposes requirements on non-negotiations unit members and inappropriately grants unit members the right to determine educational policy.^{19/} Despite my inquiries during oral argument, Rutgers was unable to specify any alternative(s) that would comprehensively address and allay the "severe personal

^{19/} In this regard, Rutgers has raised valid arguments that necessitate a modification of the remedy. More specifically, AAUP has conceded that Rutgers accurately "identified" that the proposed relief/TRO "harm[s] . . . the University['s] . . . managerial prerogative to set educational policy", placing the determination of masking policy in the hands of individual unit members rather than Rutgers. See AAUP Reply Br. at 9; see also In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 22 (App. Div. 1977); Bd. of Educ. of Woodstown-Pilesgrove Reg'l Sch. Dist. v. Woodstown-Pilesgrove Reg'l Educ. Ass'n, 81 N.J. 582, 591 (1980). Moreover, the proposed relief/TRO appear to extend beyond unit members' terms and conditions of employment and infringe upon the rights of third parties (e.g., students, parents, other non-unit members of the community/public). See, e.g., Middlesex Cty. Coll., P.E.R.C. No. 78-13, 4 NJPER 47 (¶4023 1977), North Plainfield Bd. of Ed., P.E.R.C. No. 83-103, 9 NJPER 136 (¶14064 1983), recon. den. P.E.R.C. No. 83-120, 9 NJPER 208 (¶14096 1983), aff'd NJPER Supp.2d 139 (¶120 App. Div. 1983), City of Asbury Park, P.E.R.C. No. 79-101, 5 NJPER 260 (¶10148 1979), Florham Park Bd. of Ed., P.E.R.C. No. 93-64, 19 NJPER 117 (¶24056 1993).

inconvenience" of death and/or life-threatening illness created by its mid-semester rescission/modification.

Accordingly, I find that AAUP has established irreparable harm.

(C) Relative Hardship and Public Interest

I also find that AAUP has demonstrated relative hardship and that the public interest will not be injured by an interim relief order.

While acknowledging that Rutgers has raised valid arguments regarding the proposed relief/TRO, the relative hardship that could accrue to AAUP unit members' (or those they live with) in terms of death and/or life-threatening illness due to increased exposure to COVID-19 certainly outweighs any inconvenience to Rutgers - particularly if Rutgers' rescission/modification is fully-implemented except for any accommodations^{20/} afforded to unit members who are immunocompromised, live with someone who is immunocompromised, or for other good cause.

Moreover, Rutgers itself has contributed to the relative hardship that it complains of by reiterating (absent any disclaimer) that it was continuing its face covering requirement throughout the Fall 2022 semester as recently as August 16, 2022 (Butterfield Certification, Ex. A; Givan Certification, ¶2), only

^{20/} Accommodations which, in part, are consistent with Rutgers' "Disability and Accommodation Policy" (University Policy Section # 60.1.34).

to reverse course on September 26, 2022 (41 days later) (Calcado Certification, ¶¶8-9, Ex. A; Givan Certification, ¶5).

Again, while acknowledging that Rutgers has raised valid arguments regarding the proposed relief/TRO, the public interest will not be injured by an interim relief order that does not disturb the full implementation of Rutgers' rescission/modification except for any accommodations afforded to unit members who are immunocompromised, live with someone who is immunocompromised, or for other good cause. In Edison Tp., I.R. No. 2010-3, 35 NJPER 241 (¶86 2009), the Commission Designee noted the following:

. . . [T]he public interest is furthered by requiring adherence to the tenets expressed in the Act which require parties to negotiate prior to implementing changes in terms and conditions of employment. Maintaining the collective negotiations process results in labor stability and thus promotes the public interest.

[35 NJPER at 243.]

Accordingly, I find that AAUP has demonstrated relative hardship and that the public interest will not be injured by an interim relief order. See Monmouth Cty., I.R. No. 2021-4, 47 NJPER 116 (¶29 2020), recon. den. P.E.R.C. No. 2021-15, 47 NJPER 224 (¶50 2020).

CONCLUSION

Under these circumstances, I find that the AAUP has sustained the heavy burden required for interim relief under the

Crowe factors and grant in part the application for interim relief pursuant to N.J.A.C. 19:14-9.5(a). This case will be transferred to the Director of Unfair Practices for further processing.

ORDER

AAUP-AFT, AAUP-BHSNJ, and Part-time Lecturers AAUP-AFT's (collectively, AAUP) application for interim relief is granted in part as set forth below:

-Rutgers, The State University of New Jersey (Rutgers) is directed - pursuant to its "Disability and Accommodation Policy" (University Policy Section # 60.1.34) - to process applications filed by immuno-compromised unit members who are at greater health risk due to increased exposure to COVID-19 on an expedited/emergent basis, and to meet/confer with AAUP to promptly develop and implement reasonable accommodations for applicants while their applications are being processed/pending;

-Rutgers is directed to develop/implement a process (e.g., amending University Policy Section # 60.1.34) on an expedited/emergent basis by which unit members who live with someone that is immunocompromised (and/or for other good cause shown) and at greater health risk due to increased exposure to COVID-19 can apply for an accommodation, and to meet/confer with AAUP to develop and promptly implement reasonable accommodations for prospective applicants while that process is being developed/implemented and, thereafter, while applications are being processed/pending; and

-this Order will remain in effect pending a final agency decision or until the parties negotiate a resolution.

AAUP's proposed relief is denied and the temporary restraints issued on October 3, 2022 are hereby dissolved.

/s/ Joseph P. Blaney
Joseph P. Blaney
Commission Designee

DATED: October 11, 2022
Trenton, New Jersey